Contractor Registration SB 228/AB466

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DESCRIPTION: This legislation is a response to the growing problem in the construction industry of employers misclassifying workers as independent contractors. Rather than pay their workers as employees, contractors are handing them 1099 Tax Forms and paying them as independent contractors. Contractors who misclassify their employees have a competitive advantage because they do not withhold federal and state taxes or pay unemployment or workers compensation insurance. Not only are these costs illegally shifted to the individual worker, the "independent contractor" loses the protection of various employment laws (minimum wage and overtime requirements, workers compensation, etc.) We are seeing more and more instances of this illegal practice being used by framing, drywall, roofing, siding, and flooring covering contractors.

We believe the best way to deter contractors from misclassifying workers as independent contractors is to require all contractors in the state of Wisconsin to register with the Department of Commerce (DOC). This bill also will allow consumers to search the DOC website to determine whether they are hiring a legitimate contractor.

TALKING POINTS:

SB 228/AB466 will do the following:

- Requires the Department of Commerce (DOC) to register any person who desires to act as a contractor or subcontractor and who meets certain registration requirements established by DOC.
- Requires DOC to promulgate rules establishing standards for the registration of contractors and subcontractors, application procedures for persons who apply for such registration, and conditions under which DOC may suspend or revoke such a registration.
- Creates a contractor advisory committee to make recommendations to DOC regarding the promulgation of these rules.
- Provides that a person may not act as a contractor or subcontractor or perform construction services unless the person is registered as a contractor or subcontractor by DOC.
- Prohibits a contractor or subcontractor from entering into contracts with a subcontractor who is not registered with DOC.

- Prohibits a contractor or subcontractor from claiming a lien for construction services performed or materials procured if the contractor or subcontractor is not registered with DOC.
- Requires DOC to establish an internet site that consumers may use to determine whether a contractor or subcontractor is registered.
- Requires registered contractors to display their registration number on all construction bids and advertising.
- Authorizes DOC to directly assess a forfeiture by issuing an order against any person who violates the bill's requirements.
- Prohibits any contractor or subcontractor from coercing or inducing a person to falsely declare he or she is an independent contractor.
- Exempts anyone performing construction work on his or her own property.

Discussion Points:

- Misclassification is costing Wisconsin millions in uncollected taxes, unemployment insurance and workers compensation premiums. A 2004 Harvard study of the construction industry in Massachusetts estimated that 14 to 24% of employers misclassify their workers at a cost of $21 million to the state. A 2005 state audit* of all Illinois employers revealed a 19.5% rate of misclassification—or 63,666 employers, of which over 7,000 were construction employers. It is estimated that the unemployment insurance system in Illinois lost $53.7 million in 2005. Misclassified independent contractors, according to published data, are also known to underreport their personal income by as much as 30% resulting in lost income tax revenue. In just 2005, that came to $149 million of income tax not collected in Illinois. (*Data provided by the Illinois Department of Employment Security for a project funded by the National Alliance for Fair Contracting—a labor/management group promoting compliance with all applicable laws in public construction.)

- While misclassifying workers as independent contractors is already illegal, enforcement is difficult. Requiring registration of all contractors, making it illegal to engage a non-registered contractor, and creating a database of contractors, will create a better mechanism for enforcement.

- Registration is a simple way for the state and consumers to accurately identify real contractors and subcontractors.

- Registration protects contractors who are doing the right thing. Misclassification creates an unlevel playing field where contractors that appropriately classify workers have higher costs and lose work to unscrupulous contractors who misclassify their employees. Studies show that contractors who misclassify have a 15-40% competitive advantage in bidding work. Registration levels the playing field.

- Many of the workers being exploited by misclassification are illegal immigrants who have no recourse but to accept their situation for fear of calling attention to their immigration status.

- Contractors who pull permits for construction of one and two family dwellings are already required to register with the DOC and demonstrate financial responsibility. Because this mechanism is already in place, establishing the registration requirement will not impose an undue administrative or fiscal burden. The DOC has indicated expanding current requirements to all contractors is feasible. A website listing one and two family dwelling contractors registered with DOC already exists.

- This legislation applies only to construction contractors. The bill is not a licensure proposal. In fact, we have more stringent standards for individuals making a living as manicurists and barbers.

- Roadbuilding, electrical, plumbing, HVAC and sprinkler contractors will not be required to register under the bill, unless they perform the types of construction covered under the bill.

THE DAILY REPORTER
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Supreme Court rules in favor of sub

Joe Grundle , joe.grundle@dailyreporter.com
January 31, 2007

A Wisconsin Supreme Court ruling Thursday reaffirmed that the burden of proof in determining employee status for workers' compensation premiums falls on insurance companies.

In Acuity Mutual Insurance Company v. Miguel A. Olivas, the justices upheld a ruling from the Court of Appeals but did so on different grounds.

"We were happy with the Court of Appeals' ruling but thought they made it for the wrong reason," said Olivas' attorney Ness Flores of Flores and Reyes Law Offices, Waukesha. "We thought Olivas was covered by the act, not just common law, and the Supreme Court adopted our rationale completely."

The case involved Sheboygan drywall subcontractor Miguel Olivas, who was assigned jobs by Steve Ten Pas, owner of Ten Pas Drywall. As an independent contractor and not an employee of Ten Pas, Olivas had to secure his own liability and workers' compensation insurance, which he did through Acuity.

Olivas and a crew of five Spanish-speaking men then worked the jobs together. The unusual joint venture between Olivas and Ten Pas was formed because the workers in question were illegal immigrants.

Because Ten Pas didn't directly contract with any of the workers other than the documented Olivas, he did not perform background checks on them.

Premiums raised

When Acuity audited Olivas' contract, it determined the men working with him were not independent contractors, and therefore his employees, so they raised Olivas' premium and billed him an additional $32,000.

Olivas refused to pay on the basis that the men were not his employees rather simply co-workers, and Acuity sued.

The Court of Appeals ruled that Acuity failed to distinguish whether or not the workers were employees or self-employed contractors under common-law criteria, which is less stringent than the state's Workers' Compensation Act, and ruled in favor of Olivas.

The Supreme Court disagreed with the lower court, finding that the WCA did apply and agreeing with Acuity that the men did not meet the act's nine-point test required to establish themselves as independent contractors.

However, because Acuity was unable to prove the workers were actually employees of Olivas and not Ten Pas, who Acuity had no contract with, the Supreme Court still ruled in favor of Olivas by a vote of 4-3.

Not employees

Chief Justice Shirley Abrahamson wrote: "Simply concluding that the workers at issue are employees and not exempt independent contractors within the act does not mean that Acuity can collect additional insurance premiums from Olivas for the workers at issue. A sufficient nexus must exist between Olivas and the workers to enable this court to conclude that the workers are in the service of Olivas.

"Olivas' worker's insurance policy does not cover every person who is an employee of some employer; it covers only employees in the service of Olivas."

Acuity contended that it would be liable under Olivas' policy -- which included a clause protecting "Olivas' employees" -- if one of them got hurt on the job. Still, the court ruled, Acuity had to sufficiently prove that the workers fell under the category of "Olivas' employees" and didn't.

Acuity determined the men were Olivas' employees because he distributed 1099 forms to the men. The defense countered that it was Ten Pas who was the real employer. He decided how much each drywall job would pay by its size and complexity, and he issued a 1099 income tax form to Olivas, who made copies and distributed them to his co-workers. Ten Pas paid Olivas, who then split his earnings with his crew.

The court ruled that the men were not employees of Olivas because he did not set their pay, did not profit off the workers, did not tell them when to start or stop working, did not pay them benefits, did not provide them tools, and had no power to hire or fire them.

"Acuity said that because the men were not independent contractors, that must make them automatically employees of Olivas, so he's responsible (for higher premiums)," said Flores. "But even if they are not independent contractors, you have to show they fall under Olivas before you can make him responsible.

"There has to be an employer-employee relationship that exists, and we had evidence to the contrary."

Distributed pay to workers

Acuity's contract with Olivas, whose initially calculated premium payment was $3,513, was based on his estimated annual earnings of $25,000. But when Acuity discovered Olivas had received about $190,000 from Ten Pas, which Olivas distributed to his crew, it increased the premium to reflect its compensation exposure to the other workers.

In the dissenting opinion, Justice David Prosser wrote that the Supreme Court's decision makes law by opining who qualifies as an employer and an employee in circumstances where the purported employees are undocumented workers, in this case illegal immigrants, and that setting this precedent would create uncertainty for employers and insurers.

Prosser noted that Olivas became an employer, whether he viewed it that way or not, when he agreed to get insurance so Ten Pas would hire him and the crew he represented. Prosser added that it was reasonable for Ten Pas to assume that when Olivas acquired liability protection for himself, he covered his crew as well and cited Olivas' testimony as proof he asked Acuity to cover the entire group.

Acuity could not be reached for comment.

Illegal status ignored

While the issue of illegal immigrants did not get as much attention from the court in the case as the more pressing issue of what defines an employer-employee relationship, it was a major reason the dispute happened in the first place.

Olivas was the liaison to a drywall contractor for a six-worker crew because he was the only one who spoke English and was documented.

"The 6,000-pound elephant in the room that everybody kind of brushed over was that the reason this was a joint venture (between Olivas and Steve Ten Pas of Ten Pas Drywall) was that some of these guys didn't have immigration papers," said Flores. "Ten Pas didn't want them on his payroll because he wasn't allowed to legally do that, but whatever Olivas did was then his responsibility."

Flores said many larger contractors employ illegal immigrants through the use of independent contractors.

"I think that's the way a lot of businesses are working around laws about hiring illegal immigrants," he said. "They want to hire them because they are good workers, but they don't want to have it traced back to them. So they hire an independent contractor and say he can hire whoever he wants."

The Economic Costs of Employee Misclassification in the State of Illinois

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A Report by the

Department of Economics
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December 6, 2006

This research project received funding from the National Alliance for Fair Contracting (NAFC)

I. Summary Findings

This report is a first step toward analyzing the economic implications of employee misclassification for the public and private sectors in the State of Illinois. It is based upon aggregate audit data for the five-year period, 2001-2005, provided by the Illinois Department of Employment Security (IDES) and the results of similar studies on misclassification in other states. In this report, we analyze the scope and trends of misclassification in Illinois. We provide estimates of the impact of misclassification on Illinois state revenues, the unemployment insurance fund, and for workers' compensation in Illinois.

Employee misclassification is defined as the case where employers treat workers as independent contractors that should otherwise be wage or salaried employees. If an employee is classified as an independent contractor, the employers are not required to pay a variety of payroll-related taxes, fees and benefits (e.g. social security, unemployment insurance, income taxes, workers compensation, pension and health benefits, etc.). Not only are these costs illegally shifted to the individual worker, the "independent contractor" is also not fully protected by various employment laws (minimum wage and overtime requirements, workers compensation protection, the right to form a union and bargain collectively, etc.) and may, incorrectly, believe he or she is not protected by Illinois unemployment laws.

The issue of misclassifying employees as an independent contractor is a growing problem for the unemployment insurance system in Illinois and the nation since employers remit their unemployment taxes based upon their payroll. Recent studies have shown that misclassification by employers is increasing.[1] Note, the "underground economy" (workers paid in cash) is outside the scope of our study. Thus, the estimates we provide may underestimate the full extent of the problems associated with the employer practice of misclassification in Illinois.

Misclassification negatively impacts the citizens of Illinois in several ways. First, the conditions for a fair and competitive marketplace are sabotaged. Firms that misclassify can bid for work without having to account for many normal payroll-related costs. This illegal practice can decrease payroll costs by as much as 15 to

[1] In a report by the National Employment Law Project, it was reported that US DOL quarterly audits found 30,135 employees misclassified in 2002. This was a 42% increase from the prior year.

30%. This places employers who correctly classify their employees at a distinct competitive disadvantage.

In Illinois, workers who have been misclassified, but who have been paid on a 1099-basis, may still receive unemployment insurance benefits if they complete an affidavit and file for benefits. When they do so, a benefit-related audit is triggered by the Audit Section of the Illinois Department of Employment Security (IDES) to determine the eligibility of the former employee. If the employer can be located and/or the former employee's eligibility can be confirmed, the employer will be subject to collection procedures to recover the unreported wages. Ultimately, in a legal sense, it is not the employer but state law that determines who is eligible for unemployment insurance benefits. Still, the violating employer will have been able to gain business illegally by exploiting their competitive advantage during the bidding process and they will have profited by avoiding other payroll related expenses.

Several studies have shown the problem of misclassification to be particularly acute in the construction sector. A U.S. Census Bureau analysis of projected employment by major industry division for the period 2004-2014 shows that the growth in overall employment is projected to increase 14.8%, or an annual rate of increase of 1.4%; in construction, the growth in employment is projected to increase 11.4%, or an annual rate of increase of 1.1%. Given the projected growth in the construction sector, the impacts of misclassification will get worse.

A number of studies have been conducted to assess the extent and impact of misclassification. For the 11 states studied, the moderate rate of misclassification was from 13-23%. In two states, Massachusetts and Maine, the incidence of misclassification in the construction industry is higher than all other industries in their states. For Massachusetts, the moderate statewide rate is 19%, while the rate of misclassification in the construction sector is 24%; for Maine, the low statewide estimate is 11%, while the incidence rate of misclassification in the construction sector is 14%. In a report by the General Accounting Office (1996), it was reported that the percentage of misclassified workers in all industries was 15%, while the percentage of misclassified workers in the construction sector was 20%.

In Illinois, since 2003, the Unemployment Insurance Trust Fund has been experiencing increasing deficits. While the key contributing factor to the growing deficit was the downturn in the overall economy during this period,

misclassification did partially contribute to the negative outcomes. A review of the Fund's year-end balances shows the trend. From 1987 through 2002, the Trust Fund ended each year with a positive balance. In 2000, the year-end trust fund balance was a positive $2.051 billion. However, in 2003, the Fund ended the year with a $511 million deficit which was projected to increase to a $627 million deficit in 2004.[2]

States, including Illinois, perform unemployment insurance audits that are both random and non-random. The purpose of performing non-random audits is to search for incidents of misclassification where they are more likely to be discovered than with random audits alone. In Illinois, unlike some other states, nearly all the non-random audits were related to specific filings for unemployment benefits. Unlike Illinois, some other states also perform "targeted" audits that are based upon the conduct of employers. Examples of these situations would include the delinquent filing of reports, late registration, past violations of state law such as with misclassification of employees, etc. For the purposes of making informed projections for our study on Illinois, random audits will provide a lower bound estimate on the prevalence of misclassification while non-random audits will provide an upper bound estimate on the extent of misclassification.

Based upon data provided by the Illinois Department of Employment Security, the audit department conducted 23,587 audits for the five-year period, 2001-2005. Of these audits, 18,092 or 76.7% were random. Benefit related audits (e.g. non-random audits) were 5,106 or 21.6% of the total. These two audit types account for 98.3% of all unemployment insurance audits in Illinois for 2001-2005. The remaining 1.7% was comprised of six other audit types (see table, Page 23).

Employee Misclassification in Illinois

- For the years 2001-2005, state audits found that 17.8% of the audited Illinois employers had misclassified workers as independent contractors. This translates into approximately 56,650 total employers statewide of which 6,206 were in construction. In 2005, the rate of misclassification was higher, 19.5%. This translates into 63,666 employers statewide with 7,040 employers in

[2] The Unemployment Insurance Trust Fund. Illinois Department of Employment Security. August 19, 2004.

construction.[3] Based upon the fact that 76.7% of these audits were random, **the rate of misclassification in Illinois indicates that the rate of misclassification may be higher in Illinois than in other states that have been studied.**

- **When an employer practices misclassification in Illinois, the results show that this behavior is pervasive.** An analysis of the percentage of employees that are misclassified indicates that it is a common occurrence rather than a random one in those companies that do misclassify. According to the data provided by the Illinois Department of Employment Security, 28.8% of workers were misclassified by employers that were found to be misclassifying for the period 2001-2005. The rate of misclassification showed an upward trend as well. In 2001, 22.8% of workers were misclassified by employers who were found to be misclassifying; this had increased to 33.0% in 2003, and had decreased somewhat to 27.6% in 2005. **The rate of misclassification by violating employers had increased 21% from 2001 to 2005.**

- From our analysis of the labor force of all employers in Illinois (those that misclassify and those that don't), we estimate that 7.5% of employees in Illinois were misclassified as an independent contractor for the period 2001-2005. **The audit results show that misclassification is a growing problem in Illinois.** While 5.5% of employees in Illinois were estimated to be misclassified in 2001, this increased to 8.5% in 2005. **This represents a 55% increase in the misclassification rate in Illinois from 2001 to 2005.**

- The number of employees statewide that were affected by the improper misclassification is estimated to have averaged 368,685 annually for the 2001-2005 period. For 2005 alone, the estimated number of employees affected by misclassification had increased to 418,870. Within the construction sector for the period 2001-2005, the number of employees affected by misclassification is estimated to have averaged 20,202. In the year 2005, the estimated number of misclassified employees in the construction sector had increased to 22,371.

- **Misclassification of employees has a negative financial impact on individual workers, the Illinois state government, and the private sector in**

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[3] According to the Illinois Department of Employment Security, the average number of employers over 2001-2005 was 34,954 in construction and 319,054 in all industries. In 2005, there were 36,154 construction employers and 326,945 in all industries. These numbers exclude local, state, and federal government.

Illinois. The workers are directly impacted by being denied the protection of various employment laws and by being forced to pay costs normally borne by employers. State income tax revenues and the unemployment insurance system in Illinois are adversely affected as well. Misclassification also imposes other costs on employers who play by the rules, the general health delivery system, taxpayers, and upon the public at large.

- **We estimate that the unemployment insurance system lost an average of $39.2 million every year from 2001 to 2005 in unemployment insurance taxes that were not levied on the payroll of misclassified workers as they should have been. During 2005, we estimate that the unemployment insurance system in Illinois lost $53.7 million in unemployment insurance taxes.** A portion of this lost revenue may be recaptured when misclassified workers who received a 1099 apply for unemployment insurance benefits. In those cases, a benefit related audit is normally triggered and the IDES will seek to recover the unpaid unemployment insurance taxes involved. In 2005 for example, the amount of uncollected unemployment insurance tax that was recovered from these non-random audits, approximately $1.1 million, equaled nearly 2% of the total amount that we project was not collected.

- For the construction sector, we estimate that the unemployment insurance system lost an average of $2.0 million annually from 2001 through 2005 in unemployment insurance taxes that were not levied on the payroll of misclassified workers in construction as they should have been. **For 2005 alone, we estimate that the unemployment insurance system in Illinois lost $2.5 million in unemployment insurance taxes just in the construction sector.**

- According to published data, workers misclassified as independent contractors are known to underreport their personal income as well; **as a result Illinois suffers a loss of income tax revenue.** According to the IRS reports, wage earners report 99% of their wages whereas **non-wage earners (such as independent contractors) report approximately only 68% of their income. This represents a gap of 31%.** Other studies estimate the gap to be as high as 50%.

- Based upon IRS estimates that 30% of the income of misclassified workers in Illinois is not reported, **we estimate that, on average, $124.7 million annually of income tax was lost in Illinois for 2001 through 2005. In just 2005, we estimate that $149.0 million of income tax was not collected in Illinois.** For the construction sector, we estimate that $8.9 million annually of income tax was lost

in Illinois from 2001-2005. For 2005, we estimate that $10.4 million of income tax was lost in the construction sector in Illinois.

- Based upon the higher estimate that up to 50% of the income of misclassified workers is not reported, **an estimated $207.8 million annually of income tax was lost, on average, in Illinois for 2001 through 2005. For just 2005, we estimate that $248.4 million of income tax was lost in Illinois.** For the construction sector, we estimate that an average of $14.8 million annually of income tax was lost in Illinois during 2001-2005. For 2005, we estimate that $17.3 million of income tax was lost just in the construction sector.

- Misclassification also impacts worker's compensation insurance. Among other effects, costs are higher for employers that follow the rules placing them at a distinct competitive disadvantage. A large, national study reported that **the cost of worker's compensation premiums is the single most dominant reason why employers misclassify** (Planmatics, 2000). Employers who misclassify can underbid the legitimate employers who provide coverage for their employees. **The practice of misclassification shifts the burden of paying workers' compensation insurance premiums onto those employers who properly classify their employees. It has the further effect of destroying the fairness and legitimacy of the bidding process.** The same national study (Planmatics, 2000) reported that many previously misclassified workers were later added to their company's worker's compensation policy by their employer after they were injured, resulting in the payment of benefits even though premiums had not been collected.

- Based upon statewide average worker's compensation insurance premium rates published by the State of Illinois, we estimate that, on average, $95.9 million annually of worker's compensation premiums were not properly paid for misclassified workers. **For 2004, we estimate that $97.9 million of worker's compensation premiums were not properly paid due to misclassification.**

- **Worker's compensation premiums are much higher in the construction industry.** In Illinois the statewide rate for all industries is less than $3.00 (per $100 of payroll). However, within construction, rates can range from $8.01 for electrical wiring to $27.94 for concrete construction. Using an average premium rate of $10 per $100 of payroll, **we estimate an annual average of $23.2 million of worker's compensation premiums were not properly paid by construction**

employers in Illinois. Using a higher average premium rate of $15 per $100 of payroll, **we estimate this average annual amount to be $34.8 million.**

Thus, we conclude that misclassification is an increasing problem in Illinois. The effects of increasing misclassification negatively impact workers, employers, small businesses, insurers, taxpayers and tax authorities. **Furthermore, the operation of fair, competitive markets is compromised when the bidding process is undermined by the practice of misclassification.** Illinois will stand to benefit from better documentation of misclassification, from adopting measures that help to improve compliance with state statutes and from targeting employers who intentionally and repeatedly misclassify their employees.

Acknowledgements

This project received funding from the National Alliance for Fair Contracting (NAFC). According to the NAFC website: "The National Alliance for Fair Contracting (NAFC) has been providing a forum in the construction industry for those interested in fair, competitive contracting. NAFC is a labor-management organization that promotes a 'level playing field' through compliance with all applicable laws in public construction." (www.faircontracting.org)

The authors wish to especially thank the Illinois Department of Employment Security (IDES) for their assistance in providing summary-level data to us without which this study could not have been completed. Preferred de-identified, individual audit-level data, like that utilized for studies conducted in a few other states, could not be obtained due to proprietary software issues and other limitations. With enough time, funding and cooperation from numerous parties, an industry-specific analysis of misclassification could be done that would help the IDES more effectively target their resources toward those sectors with a higher rate of misclassification.

Note: Studies such as ours that project economic costs to a given state due to the employer practice of misclassification should not be taken as report cards, so to speak, on the departments in those states responsible for collecting various revenues. In fact, the Illinois Department of Employment Security (IDES) consistently ranks at or near the top for all states in the U.S. for identifying and recovering unreported wages and in other measures of performance.

WISCONSIN HOUSING ALLIANCE

THE VOICE OF FACTORY-BUILT HOUSING

Memo

Date: August 1, 2007

From: Ross Kinzler, Executive Director

SB 228

The Wisconsin Housing Alliance currently opposes SB 228 for the following reasons:

1. Many of our members already hold as many as four Commerce licenses – manufactured home dealer, manufactured home salesperson, and manufactured home installer and contractor financial responsibility. We see no reason for a fifth credential.

2. The bill has several flaws which make its usefulness questionable:

a. The bill regulates "persons" engaged in the business of contracting. It is unclear if this covers natural persons or corporations. Substantial confusion now exists over who is covered by the continuing education requirement for contractors. This confusion is being worked out in rules but it sprung from similar statutory language.

b. Some of the contracting activities listed do not require a building permit, yet that is one of the triggers in the bill for licensure.

c. Commerce already has web access for many of their credentials. This bill does not clarify just what a consumer will or will not be able to see. This is an important level of detail which should not be left to rulemaking.

We believe that an informed consumer is a better consumer, but we are not sure of all of the objectives of the proponents and believe there are better methods available than the additional round of licensing outlined in this bill.

Wisconsin Transportation Builders Association
"Connecting Wisconsin to the World"

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WTBA Testimony

Senate Committee on Commerce, Utilities and Rail

Public Hearing – SB 228

Tom Walker, Director of Government Affairs
Wisconsin Transportation Builders Association

August 2, 2007

Good afternoon, Chairman Plale and members of the Committee. Thank you for the opportunity to testify on SB-228 today.

WTBA is a statewide organization of more than 260 contractors, consultants, and associated businesses. Our members design, build, rehabilitate, improve, reconstruct, expand and modernize every form of transportation infrastructure, including state and local roads and bridges, airports, railroads, and bicycle and pedestrian infrastructure. Most of our contracting members are multi-generational Wisconsin companies that employ numerous workers and pay family supporting wages and benefits.

One of WTBA's primary responsibilities is to work with the Legislature and state agencies on an appropriate regulatory framework that protects contractors, construction workers, communities, and the environment.

I am here today to testify for informational purposes on SB-228.

As we read the bill, the clear intent is to improve the regulatory environment and provide consumer protection on housing projects. The Department of Commerce has the appropriate expertise and responsibility for this type of construction, and does a fine job in meeting its responsibilities for buildings.

Our members work almost exclusively on state and local transportation infrastructure. These projects follow Department of Transportation contract provisions directly on DOT-administered state and local projects and indirectly by local government use of state DOT specs. DOT is "our" regulatory agency, much like commerce is for building contractors.

Our members understand and support the importance of state agency oversight. But we believe that transportation construction is appropriately DOT's responsibility.

Since it is very broadly drafted, we believe that transportation contractors are clearly, but inadvertently covered and required to register under this bill with the Department of Commerce. We believe that this was not the intent of the sponsors.

Therefore, we would like to work closely with this Committee, Senator Wirch, and other stakeholders to make appropriate changes excluding transportation contractors from the scope of the proposed bill, before it moves forward.

Thank you for the opportunity to come before you today. I would be pleased to answer any questions.

COOK&FRANKE S.C.
ATTORNEYS AT LAW

MERITAS LAW FIRMS WORLDWIDE

Testimony

Senate Committee on Commerce, Utilities, and Rail

Senate Bill 228
Contractor Registration
August 2, 2007

Jeffrey J. Beiriger, CAE
Representing

American Subcontractors Association of Wisconsin
Plumbing Heating Cooling Contractors Association of Wisconsin
SE Wisconsin Drywall & Plastering Contractors Association
Wisconsin Roofing Contractors Association
Wisconsin Water Well Association

Good morning. My name is Jeffrey J. Beiriger, and I am speaking today on behalf of the several groups that I represent. The groups may have slightly different takes on SB 228, but each has a fundamental belief in fair competition. It is that belief that brings us to the table today.

Let me start by saying that SB 228 is not perfect. There are few pieces of legislation that are at this stage of the process. That said, we are given the choice of testifying in support, in opposition, or for information. Those are pretty black and white choices for a process that more often finds itself in the gray of compromise.

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Because we are interested in fair competition, we are generally supportive of this legislation and would be generally supportive of any other legislation that promotes that idea.

Like many here, the groups I represent are made up of only a fraction of the construction industry. Our members are the ones who do it right. They are licensed when required. They attend continuing education when required and often when it is not. They are registered. They pull permits. Their work is inspected. They carry the appropriate insurance coverages. They hire legal workers and don't abuse independent contactor status to bypass the legal requirements on employers. They follow good and legal business practices in dealing with their customers.

But there is a cost to doing things right. If everyone were to absorb those costs, the playing field would be level and competition on efficiency (price), quality, schedule, and other basis would be the order of the day. But when some choose to forego these requirements – most of which is already required by law – competition becomes a race to the bottom. Keep in mind that this race to the bottom can, but does not necessarily mean lower prices for anyone, but this race does suggest that competition will be based on who can do the least and get away with the most. It suggests an industry where licenses, codes, inspections, and other aspects of the law that were designed

with public health and safety in mind become an afterthought. That would be tragic for the construction industry or any other industry.

All of that said, if there is anything of concern to the groups I represent today, it is that SB 228 be crafted in such a way that it really does accomplish its stated objective. Nobody wants another paperwork requirement, especially one that won't address the problems of unfair competition. If we go that route, we will have done nothing more than add another item to the list of things with which our members will comply and others will ignore.

Some will tell you that that is what SB 228 is and for that reason it should be opposed. Perhaps, but we would prefer that the legislature and the industry instead embrace what is conceptually a good idea, and focus on creating a system of contractor registration that works and one that will be enforced though both public an private (contract/market) means.

As for the individual groups represented today, I would make a couple of comments. Subcontractors are intrigued by the idea of a requirement that prime contractors and owners only use subcontractors who are registered.

The plumbing industry notes that the bill really doesn't contemplate their industry. The Department of Commerce does regulate the plumbing industry, but it does so at the individual, not company level. That is, you

must be or employ a master plumber to own/operate a plumbing business, but there is no registration of the business itself. If this bill results in a system of registration and enforcement that will truly be effective, they might ask to be included in the requirements of the bill.

The roofing industry and the drywall/plastering industry are two of the industries that are hardest hit by the pervasive and often-times illegal use of independent contractors. SB 228 is a step in the right direction and for that reason, these groups are very supportive of the advancement of the bill, with particular interest in the enforcement mechanisms for making certain that the bill has the intended effect.

Finally, those who drill wells are required, as contactors, to be registered, but they are registered not with the Department of Commerce, but with the Department of Natural Resources. There are provisions in SB 228 that pique their interest, but they wish to avoid any duplication of registration. That could suggest an exemption for the industry or it could mean some sort of arrangement wherein registration with Commerce would not be necessary, with DNR transferring any necessary information to DNR for inclusion in a single-point database.

We appreciate the opportunity to testify today. Ultimately, it is for all of you to decide whether SB 228, in its current form or in some revised

form, accomplishes its stated public policy objective. Our purpose today is to encourage you to embrace the idea of a system of contractor registration and to support fair competition in the construction industry. SB 228 is a step in the right direction....

Thank you. If you have any questions, I will be happy to answer them.

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Associated Builders and Contractors, Inc.

Wisconsin Chapter

Testimony on Senate Bill 228
Senate Committee on Commerce, Utilities and Rail
Senator Plale, Chairman
August 2, 2007

Associated Builders and Contractors of Wisconsin, Inc is opposed to the adoption of Senate Bill 228. This legislation creates a contractor registration system within the Department of Commerce.

Proponents of this legislation believe that this registration system will reduce the instances of employers inappropriately classifying workers as independent contractors.

The misuse of independent contractors is often the result of individuals ignoring or actively avoiding their obligations under law. This practice is harmful to employees and to legitimate employers alike and should be prosecuted.

However, these violations are not the purview of the Department of Commerce. Employee misclassification is more specifically a (potential) tax violation, a workers compensation violation, and an unemployment insurance violation.

There are multiple agencies (Workers Comp, Unemployment Comp, Dept. of Revenue, and the IRS) that currently have regulatory authority and existing enforcement processes in place to detect and correct these violations.

These agencies routinely share information, cross-check lists, review tax returns, audit employer records, respond to complaints, and even have field investigators who conduct jobsite inspections.

One could argue that these existing systems need improvement. That may be a valid point. However, we think it is unreasonable to expect the Department of Commerce (without significantly shifting staff and reprioritizing duties) to do a better job than other agencies already engaged in this task.

Simply put, we do not feel that creating yet another system within yet another department will increase compliance.

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Jim Doyle, Governor
Mary P. Burke, Secretary

commerce.wi.gov
Wisconsin
Department of Commerce

October 24, 2007

Honorable Senator Wirch
Room 317 East
State Capitol
Madison, Wisconsin 53707-7882

Dear Senator Wirch:

The Department of Commerce supports the Senate Substitute Amendment to 2007 Senate Bill 228, LRBs0129/4.

We feel there is no need for a "handyman" exemption relative to the contractor registration requirements in the Substitute Amendment. As reflected in the Fiscal Estimate Narrative from Commerce, the estimated Commerce registration fee is expected to be $15.00 for a four year registration. That calculates out to just $3.75 per year, or about one cent per day. This fee amount should accommodate even the smallest contractor.

Also, please note that the registration requirement in the Substitute Amendment applies only to contractors and subcontractors who contract to perform construction activities. Activities such as washing windows or changing screens and storm windows are not included in the definition of the term "construction activities".

If Senate Bill 228 were to become law, Commerce would implement its contractor registration requirements in the most efficient and cost effective manner. Contractors already required to be registered, certified or licensed, under other laws administered by Commerce, would not be required to pay additional fees or obtain separate credentials from Commerce. Rather, Commerce would add the registration requirements and business obligations contained in SB 228 to the administrative rules now in place for Dwelling Contractors, etc. Such entities would be required to hold just one contractor credential from Commerce while being regulated by all laws and rules applicable to the combined credential.

I hope this information is of help to you.

Sincerely,

Robert G. DuPont
Director, Bureau of Program Development

ROBERT W. WIRCH

STATE SENATOR TWENTY-SECOND DISTRICT

November 8, 2007

TO: Senators

FR: Senator Robert Wirch

RE: SB 228

I would ask members to vote aye on adoption of SA 3 to SSA 1, and aye on SSA 1 and for passage of SB 228 as amended. I would also ask members to oppose any amendments that would serve to create registration requirement loopholes.

Today in cities across our state honest contractors, their employees and consumers are being harmed by the practice of misclassifying workers on construction sites as "independent" contractors. This practice is most prevalent when it comes to drywall hanging and roofing.

The misclassified worker is handed a federal 1099 tax form and told they'll be paid in cash and that they are responsible for the payment of taxes. Of course, there is no workers compensation, unemployment compensation, or social security and questions regarding insurance – either to cover losses incurred by the property owner or injuries to the worker become issues. This creates potential loss and liability nightmares for the property owner.

Since the contractor engaging in this practice pays next to nothing for labor – they are able to undercut the bids of honest contractors and take work away from our constituents who are willing and able to do the work for a living wage.

Under this bill, anyone working on a construction site will be a registered contractor, registered subcontractor, or a direct employee of a contractor or subcontractor. Appropriate taxes will be withheld and worker's compensation and unemployment compensation laws will be followed.

After the bill received an initial hearing, I worked through multiple drafts of a substitute amendment to ensure that concerns raised in committee were addressed. The fourth draft resulted in SSA 1.

SSA 1

- Narrows the definition of construction activities.
- Requires a person to be engaged in the business of construction. Homeowners are exempted as are next door neighbors that help build a deck in exchange for payment.

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- Creates a website for consumers, and contractors seeking subcontractors, to refer to for information regarding contractor names and addresses, contact names, and information regarding performance bonds or other financial assurance to ensure the work of the subcontractor or contractor.

- Creates penalties for persons that hold themselves out or act as a subcontractor or contractor without registering.

- The contractor or subcontractor that violates the provisions of this bill would also lose their construction lien rights solely for the portion of the work done under contract by a person who was not registered.

SA 3 to SSA 1 does two things.

- Contractors currently registered with Commerce for another purpose will not have to fill out additional forms or pay additional fees – they will be considered registered for purposes of this bill.

- Also, in the unlikely event a contractor's registration would expire while working on a project this amendment makes it clear that the subcontractor had to be registered while entering into the contract rather than when the work was performed.

Information regarding memo from Wisconsin Builder's Association.

SSA 1 was introduced October 24th and SA 3 to SSA 1 was introduced November 5th – yet a November 8th memo released by the Wisconsin Builder's Association fails to take into account provisions of those amendments and fails to properly understand and relay provisions of current law.

2005 Wisconsin Act 200 pertains to continuing education for contractors that pull a building permit. It's not relevant to discussions about subcontractors that do not pull a permit and so-called "independent" contractors. Please see the attached Legislative Council memo on 2005 Act 200.

SB 228, as I've amended it, is not "redundant." Contractors who have to register and fulfill provisions of 2005 Wisconsin Act 200, or other provisions of current law, will be considered to have registered for purposes of this bill.

As in other provisions in law, like plumbing licensing, this bill does provide Commerce with the ability to assess forfeitures for violations. However, the Builders implying Commerce will have too much latitude and assess forfeitures when contractors are "deemed" in violation is nonsensical at best. Complying with the provisions of this bill isn't rocket science.

If you are a contractor or subcontractor you register. If you want someone to work on a project and that person isn't registered, you hire that person as an employee. A contractor or subcontractor that takes those simple steps will never be assessed forfeiture.